Supreme Court, U.S
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In the

Supreme Court of the United States

Thomas A. Lamb,

Petitioner,

Vs.

Patricia D. Pierce,

Respondent.

On Petition for a Writ of Certiorari to the Alaska Supreme Court

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PETITION FOR A WRIT OF CERTIORARI

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Petitioner, Pro se

QUESTIONS PRESENTED

Petitioner presented a federal constitutional challenge against the statutory laws that govern child custody proceedings in Alaska. The Petitioner requested a summary judgment and the facts to the case were uncontested. The trial court denied the summary judgment and the Alaska Supreme Court affirmed the trial court's decision.

1. Whether statutory laws that govern a child custody proceeding in Alaska, violate the First Amendment, the Fourteenth Amendment, the separation of powers doctrine and the privacy doctrine to the United States Constitution.

2. Whether under the doctrine of *parens patriae* or without a compelling state interest, is judicial discretion limited in a child custody proceeding.

LIST OF PARTIES

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Opinions Below

The Memorandum of Judgment issued by the Alaska Supreme Court dated November 1st 2006 is not published and is reproduced at App. A at 1a. The order by the Superior Court dismissing the Petitioner's motion for Amended Summary Judgment is not reported and is reproduced at App. C at 12a.

Jurisdiction

The order by the Alaska Supreme Court sought to be reviewed was entered on November 1st, 2006. The petition is timely under 28 U.S.C. § 2101 and Supreme Court Rule 13.1 because it is being filed within 90 days of entry of the order sought to be reviewed. This Court has jurisdiction pursuant to 28 U.S.C. § 1254 and 28 U.S.C. § 2403 (b) applies to this case. The Attorney General will be served a copy of this brief.

Constitutional and Statutory Provisions Involved

The relevant statutory provisions are Alaska Statute 25.20.090 and Alaska Statute 25.24.150. set out at App. H at 23a. And the United States Constitution set out at App. I at 29a.

Statement of the Case

The Petitioner's federal claims are based upon allegations that Alaska's child custody laws violate federal constitutional doctrine established by this Court.

Historically, the parties in this case were married on March 21, 1987 in Anchorage, Alaska. One child, Tommie Alexandria Lamb, was born on August 10, 1993. The parties separated in February 1995 and a divorce case was

filed on July 3, 1995. The case was tried on April 23, and 24, 1996. The trial court distributed its Findings of Fact and Conclusions of Law and a decree of Divorce on May 9, 1996. App G at 20a.

The Respondent was awarded primary physical custody and sole legal custody based on the trial court's findings that the couple were not able to *cooperate* and *communicate* on the welfare of their child and the Respondent was the *primary caretaker*. There was no finding of a parent being unfit.

In March of 2003, the Petitioner filed a Motion for Declaratory Judgment that was later withdrawn. In the Motion for Declaratory Judgment, the father challenged the statutory laws that dealt with custody.

On August 26th, 2004, a Motion for Reinstatement of Motion for Declaratory Judgment was filed. The triggering mechanism for the motion was the Respondent and the child moved away from the Petitioner, which created a change in circumstance.

The Petitioner filed an affidavit in support of the motion. In the affidavit, the Petitioner stated that there were problems with visitation and medical information was not being transcribed into the child's medical records. The Petitioner alleged through affidavit and phone recordings, the relationship between the Petitioner and his daughter was deteriorating.

The trial court basing its decision on *collateral estoppel*, denied on December 20th, 2004, the Petitioner's motion.

A Motion for Reconsideration of the denial of the Motion for Reinstatement was filed. In the Motion for Reconsideration, the Petitioner informed the court that the court misapplied the doctrine of *collateral estoppel.* The Petitioner informed the trial court that the evidence submitted went beyond the original trial date.

The trial court on January 27th, 2005, granted the Petitioner's motion to reinstate the motion for declaratory

judgment. However, without giving the parties the ability to argue on the merits of the motion after it was reinstated, the trial court ruled on the merits of the motion.

In its first ruling, the trial court elected to address only the Equal Protection Clause of the United States Constitution and the Privacy Clause of Alaska Constitution. The trial court did not address any other challenge nor did it cite any federal case law in its decision. See App. D at 13a.

A Motion for Reconsideration of Denial of Defendant's Motion for Declaratory Judgment was filed

The trial court ruled on February 14, 2005 that the Petitioner had 13 days to file supplemental briefs and the Respondent had 30 days to file her arguments. The Petitioner filed an Amended Motion for Declaratory Judgment to include a First Amendment challenge to the statutes and clarified his arguments. No arguments were filed on behalf of the Respondent contesting the facts of the case.

The trial court denied the Petitioner's Amended Motion for Declaratory Judgment on March 31st, 2005. The trial court stated "Defendant's motion to declare A.S. 25.20.090 and A.S. 25.24.150 unconstitutional is denied." See App. C at 12a.

No findings of fact or conclusions of law were written.

A Motion for Reconsideration on the merits were filed.

The trial court denied the reconsideration on April 18th, 2005. See App. B at 11a. The Petitioner then filed a timely appeal in the Alaska Supreme Court where the lower court's decision was affirmed on November 1st, 2006. See App. A at 1a.

Since May of 1996, the Petitioner has not had legal custody to his daughter. And the Petitioner has not had visitation with his daughter since August 10th, 2005.

Summary of Allegations in the Amended Complaint

Based on a change in circumstances in custody and new facts in the case, the Petitioner made a First Amendment challenge in conjunction with an Equal Protection/Due Process challenge through motions to modify the order. The Petitioner also argued that the laws as they are written, put the burden on the judiciary to correct the constitutional deficiencies in the laws and the State of Alaska did not have a compelling interest in this case. The State of Alaska in response to the Motion for Summary Judgment in this case, stated that it could not involve itself in determining the custody issue in this case. See App. E at 17a.

This Court had the opportunity to review the State of Alaska's compelling interest argument in *Lamb vs. State of Alaska.* See http://www.supremecourtus.gov/docket/01-5810.htm. cert denied. last visited November 8, 2006.

A. The Decisions Below

Superior Court Judge John Suddock dismissed the Petitioner's Motion for Summary Judgment, holding that it did not violate the federal constitution. In his rationale for treating similarly situated parties differently, he stated that the *best interest of the child standard* gives the court the broad judicial discretion to treat parties differently. Judge Suddock reasoned that another judge trying this case under the same circumstances could have come to a different conclusion on legal custody. Judge Suddock also discounted the state's motion in this case. See App. D at 15a.

This Court has stated in *Palmore v. Sidoti,* 104 S Ct 1879; 466 U.S. 429 (1984) *n.*1, that a judge is an agent for the state and as such, is acting on behalf of the state for the

purpose of a Fourteenth Amendment challenge. The State of Alaska to include the court, it seems, sidestepped this Court's position that the trial court judge is an agent for the state and through the trial judge, the state is taking a position on custody. In the amended motion, the Petitioner made it clear to the trial court that he was challenging the statutory law on more than one ground.

The court is in conflict with this Court's decision in *Troxel v. Granville,* 530 U.S. 57 (2000) when it came to ambiguous language in the law.

During oral argument, the Petitioner asked the court if it had any questions. The Chief Justice stated "this is your oral argument" and none were asked of the Petitioner. It seems the court was contradictory in it whole analysis. In *State v. Planned Parenthood of Alaska,* 53 P.3d 41 (Alaska 2001), the Alaska Supreme Court allowed a facial challenge to the State of Alaska's parental notification laws. Even when the state argued against the facial challenge and the entire statue was struck down.

However, the court took a different tack in this case when it stated:

> As the United States Supreme Court made clear in *Troxel v. Granville*, the constitutionality of a best-interest statute like Alaska's ordinarily cannot be determined on a facial basis, that is, by determining whether the statue is invalid in all applications, but must instead be considered only as the statute applies in a particular case.

App. A at 8a.

The Petitioner was not seeking to invalidate the entire statutory laws. The Petitioner cited to factors in the law that would give the state a compelling interest to intervene in custody matters. Those factors were not being challenged. The court acknowledged the fact that the challenge also

included the First Amendment challenge as well as the privacy issue. In addition, the Alaska Supreme Court's own rulings were being challenged.

And since a change in circumstances had occurred, the Petitioner would have to litigate under the statutory laws that he challenged.

The Alaska Supreme Court in *Lamb III*, stated the Petitioner "could challenge the constitutionality of the statute through a direct challenge to the original custody order through a request to modify the order". See *Lamb vs. State at *14* 2001 WL 34818205 Alaska Jun 13, 2001

This is precisely what the Petitioner did. The Alaska Supreme Court did reach the constitutional issue. See App A. at 10a.

REASONS FOR GRANTING THE PETITION

This case presents an important federal issue and offers a decision that can change the course of how family law is litigated. This case represents the norm in legal thinking in family courts.

There is no denying it, millions of families find themselves in family court, litigating over child custody. There is no denying it that family law as it is written and practiced, creates fear, anger and emotional turmoil that does not serve divorcing families and the best interests of the children involved. This Court has had the chance to visit custody decisions from *Palmore* to the most recent decision handed down by this Court in *Troxel* and one common theme in those decisions in deciding custody is the fitness of the parent.

Historically, at common law, it was found that the identity of the person who had custody of a parent's child, was irrelevant in obtaining a *writ of habeas corpus*. See *Earl of Westmeath v. Countess of Westmeath. as set out in*

a reporter's footnote in Lyons v. Blenkin, 1 Jac. 245, 264, 37 Eng. Rep. 842, 848 (Ch. 1821); accord Ex parte M'Clellan, 1 Dowl. 81 (K. B. 1831).

From this precedence, the statement was made that the identity of the person who has custody of the parent's child is irrelevant and the proof required to deprive a parent custody to their child must show they were unfit. Seton Hall Professor Holly Robinson has spelled out this argument:

> "...As a result, when the marital breakdown occurs, both parents are entitled to constitutional protection of their children through the exercise of custody. Adequate protection of this parental right requires that parents be awarded joint custody...unless a compelling state interest directs otherwise. *H.L. Robinson, Joint Custody: Constitutional Imperatives, 54 Cinn. L. Rev. 27, 40-41 (1985)*

Alaska's statutes and other states do not provide language that directs the court to read the custody statutes under this doctrine. In Alaska, the *best interest of the child standard* is codified in Alaska Statues 25.24.150 and 25.20.090. This *best interest of the child standard* allows grandparents, and "other persons" to seek custody of a parent's child. It is also the guiding principle in determining custody. See App. H at 24a.

Based on federal precedent, it is inappropriate to allow the indeterminate, imprecise, and inherently problematic *best interest of the child standard* to trump parental rights and responsibilities.

In his dissent in *Troxel*, Justice Kennedy elaborated that, if upon remand or reconsideration of *Troxel* (or another state court case), if problems with the decision remained regarding parental rights, consideration of those problems and other issues at the U.S. Supreme Court might

be warranted. Justice Kennedy wrote:

> "...The best interests of the child standard has at times been criticized as indeterminate, leading to unpredictable results. See, e.g., American Law Institute, Principles of the Law of Family Dissolution 2, and n. 2 (Tentative Draft No. 3, Mar. 20, 1998" *Troxel* 530 U.S. at 101 .

Scholarship reflects Justice Kennedy's concern. The law review article, *Inventing Family Law, 32 U.C. Davis L. Rev. 855, 856 (1999*) states that "Much has been written about how the dominant custody standard, 'best-interests-of-the-child,' effectively leaves each trial judge free to make the important value choices that necessarily underlie a custody determination."

Where two fit parents assert their fundamental parental rights in the context of a custody decision, the best interest standard is not helpful because "it provides little real guidance to the judge, and his decision must necessarily reflect personal and societal values and mores. . . ." *Bellotti v. Baird,* 443 U.S. 622, 655-56 (1979) (Stevens, J. concurring).

Alaska law related to custody determinations, raises questions of the perimeters of parental rights; the appropriate method of determining those perimeters is the history and traditions analysis employed in U.S. Supreme Court cases addressing substantive due process rights. See e.g. *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997); *Bowers v. Hardwick,* 478 U.S. 186 (1986); *Collins v. Harker Heights,* 503 U.S. 115, 125 (1992) (The nation's history, legal traditions, and practices provide the "crucial guideposts for responsible decision making.")

The nation's traditions and history test requires the courts to draw definite lines around parental rights and to remove arbitrary or vague perimeters. See *Moore v. City of East Cleveland,* 431 U.S. 494, 503 (1977) (plurality)

("Appropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful 'respect for the teachings of history [and] solid recognition of the basic values that underlie our society...' (citations and footnotes omitted)).

The laws in Alaska and many states, allows the trial court to create factors that are unforeseen to the parent. The law in Alaska allows third party members to intervene in a manner that they can present *any findings* that may be used to sever custody. And the law gives a minor child a voice that is competing to the parent's responsibilities to raise their child in a manner that the child may disagree with. *Infra at Pet. Brief pg 18,23.*

This Court has been cautious in reviewing child custody decisions for there is the belief that custody decisions should be left to the states to decide. However, change does not come easy and the Petitioner, like many parents, are left on the sidelines in having any legal responsibilities to their children.

The Petitioner has been before this Court previously and has seen his argument end with no recourse other than to go back to the same laws and system that allowed the State of Alaska without a compelling reason, severe his right to raise his daughter. This case is ripe in that it offers a decision that can change the course of family law and protect family relationships and the children involved. And not destroy them.

I. The Statutory Language in A.S. 25.24.150. and A.S. 25.20.090 Violate the Fourteenth Amendment.

It is well settled that, quite apart from the guarantee of equal protection, if a law "impinges upon a fundamental right explicitly or implicitly secured by the Constitution [it] is presumptively unconstitutional." *Harris v. McRae* 448 U.S. 297, 312 (1980).

The Due Process/Equal Protection Clause to the federal constitution provides the protection from vague laws and addresses incidental laws. And it also protects individuals from the judiciary as acting as legislators from the bench. The two primary goals of the vagueness doctrine are that the government write statutes that provide fair notice to those who must obey them. For "A statute which forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally v. General Constr. Co.,* 269 U.S. 385, 391 (1925).

The second goal is that minimal enforcement standards be established. The standards of law must be precise enough to avoid "involving so many factors of varying effect that neither the person to decide in advance nor the jury after the fact can safely and certainly judge the results." *Cline v. Frink Dairy Co.,* 274 U.S. 445, 465 (1927). This Court stated clearly the jurisprudential basis for these two parts in *Grayned v. City of Rockford,* 408 U.S. 104, 108-09 (1972).

Underlying the second part of the test, is a concern over the implications for the constitutionally mandated separation of powers, because vague laws pass much of the burden of "legislating" from Congress to the judiciary. See, e.g., *James v. Bowman,* 190 U.S. 127 (1903); *Trade-Mark Cases,* 100 U.S. 82 (1879); *United States v. Reese,* 92 U.S. 214 (1875).

In order for the Petitioner to succeed on a claim of unconstitutional vagueness or breach of the separation of powers doctrine, he must prove that "no standard of conduct is specified at all." Ibid. See *A.B. Small Co. v. American Sugar Refinery Co.,* 267 U.S. 233, 240 (1925) (what is constitutionally offensive is the "exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all.)

Arguably, Alaska courts use an evidentiary standard

for deciding custody which was found to violate the Fourteenth Amendment. "The 'fair preponderance of the evidence' standard ... violates the Due Process Clause of the Fourteenth Amendment... A preponderance standard does not fairly allocate the risk of an erroneous fact finding between the State and the natural parents." *Santosky* 455 U.S. at 746.

Under the statutory scheme, the factors listed in both A.S. 25.20.090 Paragraph (10) other factors the court considers pertinent and A.S. 25.24.150 Paragraph (9) other factors that the court considers pertinent, violate the goals of this constitutional doctrine.

There are no factors, they are unforeseen and the law does not give fair warning to the parent on what factors may be used to determine custody and it allows the trial court judge to create factors that are not foreseen. See, e.g., *James v. Bowman,* 190 U.S. 127 (1903); *Trade-Mark Cases,* 100 U.S. 82 (1879)

The trial court is given license to create factors and this goes beyond the scope and powers that the trial court is vested with. "The legislature cannot delegate its power to make law; but it can make a law to delegate power." Locke's Appeal, 72 Pa. 491, 498 (1873). *William J. Clinton, President of the United States, et al., Appellants v. City of New York* et al (June 25, 1998).

Other states such as North Dakota also have the broad statutory language. In *Hogue v. Hogue* N.W. 2d 579 (N.D. 1998) the court states:

> "...Robert's relationship and child support obligation to Blake is relevant to his disposition to provide for Robbi. Even if it does not fit squarely within subsection c, it certainly is a factor which may be considered by the trial court under subdivision m. Section 14-09-06.2(1)(m), N.D.C.C., states: 'Any other factors considered by the court to be relevant to a particular child

custody dispute. ."

In *Hogue*, the North Dakota Supreme Court affirmed the trail court's ruling awarding custody to the mother. The trial court used the father's relationship to another child not relevant to the case, as a determinant factor in deciding custody.

The court was contradictory. The father was to have been found to be a "stay at home dad" and was extensively involved with his child in the case, but the Court cited to his relationship with his other child conceived from a different woman, to sever the custody he had to the child. His conduct with his other child had no bearing on the present relationship he had with his son. *infra.*

In Alaska, the factors *poor cooperation* and *poor communication* are factors that are not defined by statutory law. *supra.* In the case *Bell v. Bell,* 794 P.2d 97 (1990), the Alaska Supreme Court reversed the lower court's ruling on the use of *poor cooperation* and *poor communication.* The basis for the reversal was that one area of "irreconcilable conflict" should not defeat the legislative preference for joint custody. *Id* at 100.

In this case, there was only one area of dispute and that was the couple's daughter's medical needs. In the *Bell* case, there was only one area of dispute. But a different and selective use of the law was applied. *supra.*

The term *poor cooperation* and *poor communication* has been selectively used in another case as was demonstrated by the Alaska Supreme Court in *Bird v. Starkey,* 914 p2.d 1246 (Alaska 1996). The court stated:

> "...In the future, a judge faced with a similar motion may choose to treat it as one to modify the joint custody arrangement with respect to educational issues, assuming the parties can continue to agree on other issues. The court could then order further briefings from the parties as to

> which parent should be granted authority to make educational decisions. While a judicial tribunal may be ill equipped to decide which school a child should attend, it is competent to decide who should decide..." *Id.*

Then in *Hamilton v. Hamilton,* 42 P.3d 1107, 1112 (Alaska 2002), a case that happened after the Petitioner's trial, the trial court hadn't followed the Alaska Supreme Court's case law in *Farrell* on adjudicating legal custody when the couple clearly had problems with *poor communication* and *poor cooperation.*

This begs the question why the different treatment to similarly situated couples? What was the State's compelling interest in the *Hamilton* case vs. this case to justify the different application of the law?

The Alaska Supreme Court has stated "We have said that "joint legal custody is **only** appropriate when the parents can cooperate and communicate in the child's best interest." *Farrell v. Farrell,* 819 P.2d 896, 899 (Alaska 1991). [emphasis added]

But in the *Hamilton* case, the Alaska Supreme Court supported the trial court's discretion even when it did not comply with the Alaska Supreme Court's holding in *Farrell:*

> "...Phyllis argues that the court erred in finding that [p]olite discussion became bickering, then argument, and by eventual declension all communication collapsed. Rather, she contends, the parties had a difficult time communicating at all times following their separation." *Id. Hamilton*

The State of Alaska or the Alaska Supreme Court would be hard pressed to logically argue why the Petitioner was denied legal custody when in the *Hamilton* case, the parents had joint legal custody and had problems with *poor*

communication and *poor cooperation.* Moreover, the Superior Court stated that this case could have been adjudicated differently under a different judge. The Superior Court touches on the evil in the law when the court stated that "...It is possible that another judge trying this case would arrive at a different conclusion regarding legal custody that the trial judge did. This does not, however, constitute an equal protection violation." *supra.*

The law is arbitrary, subjective and vague and this Court has recognized that the "variant views of judges" were the consequences of an absence of a standard and it was stated that the "consequences" of such vague standards are not limited to criminal legislation. *A.B. Small Co. v. American Sugar Refinery Co.*, 267 U.S. 233, 240 (1925).

The Alaska Supreme Court stated "the Fitzgerald court held that such guidelines would be constitutional "so long as judges and hearing commissioners continue to exercise their discretion to achieve equitable results consistent with existing case law." Id. at 732." *Coghill v. Coghill,* 836, 929 P.2d (Alaska 1992) (quoting Fitzgerald v. Fitzgerald, 566 A.2d 719, 732 (D.C. App. 1989))

Arguably, the factors *poor communication* and *poor cooperation* were borne from other factors that were listed in other case decisions. In *Farrell*, the trial court found a couple had *poor cooperation* and *poor communication* because of domestic violence and alcohol abuse. Factors that are listed and provide fair warning to parents and factors that provide the state a compelling reason to intervene in private custody matters. .

The Alaska Supreme Court has explained that it "will only overrule a prior decision when clearly convinced that the rule was originally erroneous or is no longer sound because of changed conditions, and that more good than harm would result from a departure from precedent." *State v. Semancik,* 99 P.3d 538, 540 (Alaska 2004) (quoting State v. Fremgen, 914 P.2d 1244, 1245 (Alaska 1996)).

However, even if the Alaska Supreme Court were to

overturn its previous decisions in *Farrell* and *McClain,* the court in *Scully v. Scully,* 987 P.2d 743 (Alaska 1999) stated that "a change in legal theory or a change in decisional law will not constitute a change in circumstance."

There is a history of inequitable decision rendered by the courts and they have not followed the case law established by the Alaska Supreme Court. And the *Hamilton* decision is a clear example of the inequitable use of the law. The constitutional deficiency and abridgment in the law cannot be corrected by case law, because the injury to the Petitioner can not be remedied by a change in the Alaska Supreme Court's own decisional law. *Scully supra.*

The evil in the law once again, shows itself. The Petitioner could not seek a change in circumstances if the Alaska Supreme Court changed its mind on previous decisions. It would have to be found the Petitioner and the Respondent are *communicating* and *cooperating.*

How equitable would it be that the Petitioner would have to stand by and watch other couples similarly situated get joint custody when they have problems with *communication* and *cooperation* as was done in the *Hamilton* case and he have no recourse other than wait for the Respondent to *cooperate* and *communicate*?

Another factor that has been designed by the courts is the factor *primary caretaker* and it was used by the trial court to award custody to the Respondent. The factored language of *primary caretaker* has become a doctrine used by the courts to break ties in equally fit parents.

In N.D.C.C Sec 14-09-06.2, reference to the factored language *primary caretaker* is missing also. However, Justice Berry J. Levine of the North Dakota Supreme Court *legislated* the term *primary caretaker* to break the tie between two otherwise *equally fit* parents. See *Houge v. Houge N.W.* 2d 579 (N.D. 1998) citing Weber, 512 N.W. 2d at 729 (Levine, J., concurring in result).

In *Dalin v. Dalin,* 512 N.W. 2d 685, 688 (N.D. 1994), the court affirmed the trial court's finding that neither

parent was the *primary caretaker* when one parent cared for the child approximately seventy five percent of the time.

The North Dakota Supreme Court also stated in *Hogue*:

> "...**deciding which, if either, is primary caretaker may involve more than a mathematical computation of the days spent in each parent's care, custody and control.**" Id. [emphasis added]

In *Hogue* the court affirmed *Dalin* when it stated:

> '...The Court finds each party has been a good parent to their son. The Plaintiff has been primarily a 'stay at home dad' while the Defendant has been employed full-time with the United States Air Force for the majority of the marriage."

The court's opinion in *Hogue*, shows a common standard is lacking in the language the courts have designed. Common thought would be that a *stay at home mom* and a *stay at home dad* would be similar for defining a *primary caretaker*. The Alaska Supreme Court has found such common thoughts in *Ebertz v. Ebertz* Op-5905 (Alaska 2005).

> "....**Here, the court found that Bahma-Ebertz was the primary caregiver of all three children throughout most of their lives, while Ebertz spent considerable time away from the children because of his work schedule.**" [emphasis added]

The question is, what is a *primary caretaker*? By the

courts' own opinions, there is no definitive standard on the factored language *primary caretaker* and as such, the factored language designed by the courts becomes vague, arbitrary and subjective. As argued, the classification of *primary caretaker* does not rest on a reasonable basis and is found to be "arbitrary in nature" and this "constitutes a violation of the equal protection clause." See *McLaughlin vs. Florida,* 379 U.S. 184 (1964) (a classification which does not rest upon a reasonable basis and which is essentially arbitrary in nature constitutes a violation of the Equal Protection Clause).

This is biased, derogatory and demeaning to the father who spends his time working to support his children or is in the military far from his family. And even when the court in *Hogue* was confronted with a father who was a "stay at home dad" the court found the dad to not be the *primary caretaker* when he was with the child seventy five percent of the time. *supra.*

The responsible behavior of the father is impugned by the mere fact that he is out of the house, taking care of the financial needs of the family. In effect, his worth is judged by his wallet.

The indefinite language in the statutes are nondiscriminatory on the face, but the language lends itself to be used in a discriminatory manner. In *Willaims v. Illinois,* 399 U.S. 235,242 (1970), this Court stated "...as we said in Griffin v. Illinois, supra, 'a law nondiscriminatory on its face may be grossly discriminatory in its operation.'" *Id* at n. 11.

Arguably as stated, the term *primary caretaker* is reflective of the invidious gender based discrimination in the law.

From the facts, one can find the cause for the invidious discrimination. See *Preventing the Preference for the Primary Caretaker from Becoming a Disguised Maternal Preference 101+ Practical Solutions for the Family Lawyer 133 (Contributor), A.B.A. (1996).*

Next, since the child has moved from the Petitioner, a custody investigator could be assigned to determine visitation and custody issues. So the factor in A.S. 25.20.090 (7) any findings and recommendations of a neutral mediator would apply and the factor goes beyond what is constitutionally acceptable. The words *any findings* is overbroad and vague when used together. Even when done under the *best interest of the child standard.*

The factor *any findings* is suspect when one looks to *Troxel* and how this Court viewed the language in the Washington State visitation laws that dealt with third parties. The *Troxel* Court focused on the statute's text and did so under the *best interest of the child standard.*

> "...According to the statute's text, "*[a]ny person* may petition the court for visitation rights *at any time*," and the court may grant such visitation rights whenever "visitation may serve *the best interest of the child.*" §26.10.160(3) (emphases added)." *Id.*

In *Palmore* it is found that the trial court had taken into account the recommendations of the court counselor. And as such can come under the argument on a neutral mediator and *any findings*.

> "...The court then addressed the recommendations of the court counselor, who had made an earlier report "in [another] case coming out of this circuit also involving the social consequences of an interracial marriage. Niles v. Niles, 299 So.2d 162." Id., at 25." *Id.* at 431.

This Court reversed the judgment. This Court in its criticism stated:

> "...The Florida court did not focus directly on the

> parental qualifications of the natural mother or her present husband, or indeed on the father's qualifications to have custody of the child." *Id.* at 433

Because of the broad language of the text, a neutral mediator could be biased against one parent who spanks the child and conceivably the finding could be used against the parent even if no harm is inflicted on the child.

Arguably any factor that does not define abuse or neglect by the parent as the means for severing custody and define it in a clear manner, is in violation of the principals found in the constitutional doctrine on the parent-child relationship found under the First Amendment and the Fourteenth Amendment to the federal constitution.

In other courts it has been stated:

> "...In light of the compelling interest at stake, the **best interests of the child** are **secondary to the parents' rights**. Brooks v. Parkerson (finding it ''irrelevant'' to constitutional analysis that visitation may be in best interest of child); *Roth v. Weston* 789 A.2d 431, 443-444 (Conn.2002) (citations omitted) [emphasis added]

II. The Statues in Question Violate the First Amendment Rights of the Petitioner.

The welfare of a child depends on the right of a parent to voice their concerns on an adverse behavior of a parent or person and act accordingly. The law as designed by the Alaska Supreme Court, forces a parent to squelch their opinions on the welfare of their children when in conflict with the other parent.

In this case, there is an abridgment of the First Amendment rights of the Petitioner by holding him in

connection with the Respondent and their *poor communication* and *poor cooperation* in any future finding in the change of circumstance that has occurred. *supra.*

In *Smith v. California*, 361 U.S. 147(1959), Justice Black's concurring opinion states in no uncertain terms will a law be made that abridges the freedom of speech. This is to include laws made by the States.

However, in *Wisconsin v. Yoder,* 406 U.S. 205, 234 (1972), this Court found the State has an interest in ensuring the child's well-being.

In the original case, the trial court *sua sponte* determined that "...The parties simply do not have the willingness or ability to communicate with each other in addressing the welfare and best interest of the minor child," but found the parents were able to reach an ultimate agreement by "…the needs of the daughter were being met." See App G at 21-22a.

The Alaska Supreme Court has stated that "[j]oint legal custody is predicated upon the parent's ability to reach **ultimate agreement** on the important decisions involved in child rearing." *Bird v. Starkey*, 914 P.2d 1246,1250 n.6 (Alaska 1996) [emphasis added]

One would be hard pressed to come up with a logical reason on how the State of Alaska is looking out for the child's best interest when the State severs the protective and responsible behavior of a fit parent to the child's benefit.

Since sole custody has been adjudicated, the Petitioner has not been made aware of the child's medical illnesses. The daughter's medical records do not have a complete medical history of the Petitioner and his families medical history. In this case, because of the sole custody arrangement, the child's medical welfare has been diminished. The importance on the medical history of the biological parents to the child cannot be under-stated. How important is the medical history of the birth parents?

> A complete record includes information from three generations of relatives, including children, brothers and sisters, parents, aunts and uncles, nieces and nephews, grandparents, and cousins. *http://ghr.nlm.nih.gov/info=inheritance/show/family_history Why is it important to know my family medical history?*

The association between the birth parent and the child is important and it is imperative to protect that relationship so that medical information is transcribed as accurately as possible. The fact that the court can sever custody based on *poor communication* and *poor cooperation*, raises the First Amendment argument on a parent voicing a concern and acting appropriately on that concern.

Moreover, because the Petitioner does not have legal custody, the Petitioner cannot engage in any type of religious instruction with the daughter. To include telling her the stories on the lives of the Saints. There has been no attempt to prove that the state has a compelling interest to maintain the *status quo* in the change of circumstances that has occurred or the constitutional attack against the statutory laws.

III. The Statutes in Question Violate the Petitioner's Right to Privacy.

The Alaska Supreme Court has stated: "…Alaska's privacy guarantee is broader in scope than the implicit right of privacy guaranteed by the federal constitution." *Messerli v. State,* 626 P.2d 81 (Alaska 1980);

In *Ravin v. State,* 537 P.2d 494, 515 (Alaska 1975), Justice Boochever stated:

> "…Since the citizens of Alaska, with their strong emphasis on individual liberty, enacted an

> amendment to the Alaska Constitution expressly providing for a right to privacy not found in the United States Constitution, it can only be concluded that that right is broader in scope than that of the Federal Constitution."

In regard to privacy decisions made by the Alaska Supreme Court, two stand out and that is the privacy to have in possession marijuana (*Ravin*) and parental consent laws, *Planned Parenthood of Alaska.*

In 1975, the Alaska Supreme Court held in *Ravin*, that the interest of the State of Alaska in regulating the use of marijuana in the home was not sufficient to overcome the fundamental right to privacy article II, section 22 of the Alaska Constitution provides adult citizens. See *Ravin,* 537 P.2d at 504-12.

In *Planned Parenthood of Alaska*, the Alaska Supreme Court took note of traditional constitutional analysis holding that the Alaska Constitution serves as a check on the power of government. "That all lawful power derives from the people and must be held in check to preserve their freedom is the oldest and most central tenet of American constitutionalism.'" *Id.* (quoting Laurence H. Tribe, American Constitutional Law sec. 1-2, at 2 (2d ed. 1988)).

Here, the challenge is made under the United States Constitution. Thus a question is raised on if there is a conflict between the Supremacy Clause of the federal constitution and the Alaska Supreme Court's interpretation on the language of the Alaska Constitution that pertains to privacy. The federal constitution provides that:

> "..This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in

> the Constitution or Laws of any State to the Contrary notwithstanding. "U.S. Const., Art. VI, cl. 2.

Arguably, the State has an interest in protecting the infrastructure of the parent-child relationship and then the child's well being. However, the following factors abridge the parental rights and elevate the child's rights to be equal or above those of the parents without showing harm or neglect to the child.

The factors found in A.S. 25.24.150. Paragraph (3) the child's preference if the child is of sufficient age and capacity to form a preference; and A.S. 25.20.090. Paragraph (1) the child's preference if the child is of sufficient age and capacity to form a preference; are an encroachment on the privacy held in both the Alaska Constitution and the United States Constitution.

The State creates a scenario where the child's rights are in a potential conflict with the parent's rights. The law does not draw a boundary on the issues or factors that trigger the child's rights to be elevated above the parent's authority. It does state the age and capacity to form a preference, but it does not say what issue when it comes to the preference of the child. This leaves all kinds of issues to be looked at by the court and none may have to do with actual harm to the child. The child may like one parent because that parent is less strict, or one parent may have a lot of money or one parent may bribe the child with material items. The child may be intimidated or manipulated by one parent. And that intimidation may go undetected even under the watchful eye of the court. Or the child may be alienated from the parent. And with the broad discretion that the courts have, the court could rule in such a manner that the child's preference is adjudicated.

Taking a case from this Court, it is illustrated how one scenario could fall. In *Palmore*, this Court reviewed a case where the trial court awarded custody to the father because

the mother was married to an African American. Taking this same case, but the child is now thirteen and wants to live with the father because the child feels embarrassed by the marriage arrangement, or has a bigotry. How could this case be adjudicated?

Conceivably, under the challenged language, a trial court could give the child their wish and find that the child's feelings of embarrassment was enough to warrant the decision. In arguendo, what if the parent wanted to raise their child in a manner that the child would learn to be tolerant of different races. The trial court could still veto the parent's authority by lending greater weight to the child's preference.

The Superior Court in this case has already stated "**The best interest analysis employed by the court emphasizes the child's rights and welfare, over the desires of any one parent.**" See App. D at 16a.[emphasis added]

Interestingly, Justice Kennedy puts much faith in the trial courts in his dissent in *Troxel* when he stated, "...For the purpose of a facial challenge like this, I think it safe to assume that trial judges usually give great deference to parents' wishes, and I am not persuaded otherwise here."

Taking another scenario, the daughter of the Petitioner in this case has complained of the place where the Petitioner resides and feels the Petitioner is poor. The trial court could use this as a means to deny visitation or custody in a modification. Even though no harm would come to the child, the trial court could find the child's preference carries more weight than the Petitioner's wishes that she spend time with him or that he have legal custody.

The importance of the privacy in the parent-child relationship cannot be underestimated. From custody cases to parental consent laws, the federal constitution recognizes that the child's rights are protected and maintained through the parent's rights. See e.g. *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923); *Pierce v. Society of Sisters,* 268 U.S. 510, 534-35 (1925); *Wisconsin v. Yoder,* 406 U.S. 205, 230-34

(1972), and families enjoy a right to familial privacy, *Griswold v. Connecticut,* 381 U.S. 479, 485-86 (1965), and liberty, *Stanley v. Illinois,* 405 U.S. 645, 651 (1972); *Palmore v. Sidoti,* 104 S Ct 1879; 466 US 429 (1984) . Thus giving a more enhanced protection in parental rights not less.

IV. The State Has no Compelling Interest in This Case and Judicial Discretion Should be Limited.

This Court has recognized the Due Process/Equal Protection Clause "guarantees more than fair process." *Washington v. Glucksberg,* 521 U.S. 702, 719 (1997).

> **"...the State must demonstrate that its [system affecting fundamental liberties] has been structured with "precision," and is "tailored" narrowly to serve legitimate objectives and that it has selected the "least drastic means" for effectuating its objectives..."** (*San Antonio School District v. Rodriguez,* 411 U.S. 1, 16-17 (1973). [emphasis added] (footnotes omitted)

San Antonio School District confirmed that where a "fundamental liberty" interest was at issue, the issue demanded review by the courts using strict scrutiny. See also *Bernal v. Fainter,* 467 U.S. 216, 216-217 (1984). ("In order to withstand strict scrutiny, the law must advance a compelling state interest by the least restrictive means available.")

After the enactment of the Fourteenth Amendment, this Court applied due process principles and strict scrutiny analysis to limit state invocations of its *parens patriae* power. State government exercises of *parens patriae* power are subject to the United States Constitutional system of Ordered Liberty. See *Meyer v. Nebraska,* 262 U.S. 390,

290 (1923) ("Determination by the Legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts.").

"[The admonition to function in a 'parental' relationship [of standing] is not an invitation to procedural arbitrariness." *Kent v. United States,* 383 U.S. 541, 555 (1965).

States may not exercise such power in a manner that has "all-encompassing scope and . . . sweeping potential for broad and unforeseeable application." *Wisconsin v. Yoder, 406* U.S. 205, 234 (1972).

State governments may not properly override parental decisions or terminate custody, unless 1) parents delegate their authority to the state voluntarily and knowingly, or 2) the state demonstrates through appropriate due process that there is clear and convincing evidence that the parents have triggered state *parens patriae* interests by placing their children in clear and present danger. C.f. *Croft v. Westmoreland County Children & Youth Servs.,* 103 F.3d 1123 (3d. Cir. 1997).

> **" The State registers no gain towards its declared goals when it separates children from the custody of fit parents."** (emphasis added). *Santosky v. Kramer,* 455 U.S. 745, 766-67 (1982) (emphasis added).

While the *Santosky* decision is about the termination of parental rights, *Troxel* referenced this legal authority to demonstrate the Fourteenth Amendment Due Process requirement with parental rights (in a non-termination action).

The Alaska Supreme Court in its most recent ruling has stated:

> "Referring to our decision in Lamb III, in which we noted that the state lacked any interest in intervening in private custody disputes, Lamb v. State, Mem. Op. & J. No. 1030, WL 34818205 at *3 (Alaska, June 13, 2001), Lamb suggests that the best-interests statutes do not further any state interest. But this argument mistakenly overlooks the distinction between the state's understandable lack of interest in seeking to intervene as a party in private custody disputes and its unmistakable interest in adopting a statutory regime that allows courts to resolve such disputes."

App. A at 8a.

The State of Alaska in its response to an application for a writ of certiorari to this Court in case #01-5810 argued:

> 1. There was No Actual Controversy Between Mr. Lamb And The State Because The State Has No Interest In The Custody Of Mr. Lamb's Child.

App. F at 19a.

This Court has stated "...The actions of state courts and judicial officers in their official capacity have long been held to be state action governed by the Fourteenth Amendment." *Palmore n*1.

Arguably the trial court judge and his actions adversely affects the interest of the Petitioner. And arguably, the only adverse conduct of the parent that could be a triggering mechanism for the trial court judge to intervene to severe custody, is if the Petitioner was abusive or neglectful to the

child or the Respondent was abusive or neglectful to the child. Or there was a case of physical domestic violence involved. Or there was a case of drug and/or alcohol abuse in the family.

It is argued that the Alaska Supreme Court has found a compelling state interest in cases that terminate parental rights or Child in Need of Aid (CINA) cases or cases of abuse and neglect by one parent. And the criteria met in those cases serve the state's compelling interest for third party intervention or severing custody a parent has to their child. See, e.g., *In re J.A.*, 962 P.2d 173, 177 (Alaska 1998); *In re D.D.S.*, 869 P.2d 160, 163 (Alaska 1994).

In *State v. Planned Parenthood of Alaska,* 53 P.3d 41 (Alaska 2001) the Alaska Legislature set out the State's compelling interests and that was protecting the rights of parents and maintaining the parent-child relationship.

But contrary to this very important finding, the trial court and the Alaska Supreme Court have put the child in this case, in a family setting that makes her a high risk at becoming a statistic in the scientific evidence on teen pregnancy. *71% of pregnant teenagers lack a father, U.S. Dept. of Health & Human Services press release, Friday, March 26, 1999.*

The questions that come from this is; how is it that the State's interest to ensure both parents have the opportunity to raise their children is vetoed by an opposing interest of the State? In answer, there is the hint that the Alaska Supreme Court is impeding legislative duties and acting as a legislator. However, in support of sole custody arrangements, the Alaska Supreme Court cites to *McClain v. McClain,* 716 P.2d 381, 386 (Alaska 1986) ("The most ardent proponents of joint custody assume cooperation between parents and agreement about child rearing practices as basic requirements for joint custody.")

This is contrary and outdated to the evidence. First, A non-custodial parent in Alaska has no right to make any *fundamental* decisions regarding his or her child's welfare. See *Elton H. v. Naomi* R sp-5935 (Alaska 2005) citing Bell v. Bell 794 P.2d 97, 99 (Alaska 1990) (The essential feature of legal custody is the discretion to make major decisions regarding a child's upbringing)

And second, since the adjudication of sole custody, the Respondent without reasonable cause to the child's well-being, retired and moved to Tonsina Alaska. And because of the move, visitation and contact with the Petitioner has been diminished greatly. So, the term *move-aways* has entered the legal jargon and it is a direct by- product of sole custody arrangements.

In California, the California Supreme Court addressed the issue in *In re LaMusga,* 32 Cal.4th 1072, 88 P.3d 81 (Cal. 04/29/2004)._What are professionals saying on *move-aways*?

> "...Results show significant negative effects associated with the long distance (more than an hour's drive) parental moves by the mother or father, with or without the child, as compared with divorced families in which neither parent moved away beyond an hour's." *http://www.eurekalert.org/pub_releases/2003-06/apa-roc062003.php Relocation of children after parents' divorce may lead to long-term problems, study suggests*

The scientific evidence overwhelming supports the fact that joint custody is the optimal way to promote the *best interest of the child.* See *Joint Custody Gains Popularity as a Recommendation by Psychologists, by Marc J. Ackerman, Ph.D., Wisconsin School of Professional Psychology and Melissa Ackerman, University of Denver, in Professional Psychology: Research and Practice, Vol. 28, No.2.*

Litigation over sole custody should take place in only the most egregious circumstances. See *Muller Davis & Jody Meyer Yazici, Best Interest of the Child: The case for Joint Custody Even in Contested Divorce. 84 Ill.B.J. 348 (1996) (pro)*

To bolster this argument, a research project conducted by an Arizona court service concluded that when two highly adversary parents were forced to share the child, parental conflict decreased. See *Family and Conciliation Courts Review, Vol. 33 No. 4, October 1995 495-505.*

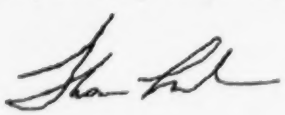
Furthermore, in a study by Judith Seltzer of the University of Wisconsin-Madison, she presented strong evidence that the purpose of sole custody falls short to the relation of the *best interest of the child* standard. In the study, The National Survey of Families and Households surveyed over 13,000 families that collected data in two waves, 1987-1988 and 1992-1994. The results clearly indicated the positive effect of joint legal custody was, it decreased the conflict among adversary parents. *Father by Law: Effects of Joint Legal Custody on Nonresident Fathers' Involvement with Children.*

It is inarguable that the Alaska statues repose unqualified and absolute authority in a judge to make any custodial award he or she deems appropriate "in the child's best interest." *Carter v. Novotny,* 779 P.2d 1195, 1198 (Alaska 1989). And do so without a compelling interest.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Thomas A. Lamb

Appendix A

THE SUPREME COURT OF THE STATE OF

ALASKA

THOMAS A. LAMB,	)
	) Supreme Ct No. S-11943
Appellant,	)
	) SuperiorCt.3AN-95-5518 CI
v.	)
	) MEMORANDUM OPINION
PATRICIA D. PIERCE,	) AND JUDGMENT *
	)
Appellee.	) No. 1263 - November 1, 2006
	)

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, John Suddock, Judge.

Appearances: Thomas A. Lamb, pro se, Anchorage. No appearance by Appellee.

Before: Bryner, Chief Justice, Matthews, Eastaugh, Fabe, and Carpeneti, Justices.

1. When Thomas Lamb and Patricia Pierce (then Lamb) divorced in 1996, Superior Court Judge Rene Gonzales granted Pierce sole legal and shared physical custody of the couple's daughter. In *Lamb v. Lamb* (*Lamb I*), we affirmed the custody award but remanded with directions to provide for vacation visitation. [1]

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* Entered pursuant to Appellate Rule 214

2. Lamb then moved to modify the custody award, alleging changed circumstances because Pierce planned to move to Ohio; he separately moved for relief from the original judgment, asserting that Pierce had perpetrated a "fraud on the court."[2] After the superior court denied both motions, Lamb again appealed.[3] He argued in part that the original custody award violated his constitutional rights as a parent; he also challenged as unconstitutionally vague and overbroad two statutory provisions, AS 25.20.090 and AS 25.24.150, that require courts to award custody based on the children's best interests and set out "best interests" factors for courts to consider in making a custody determination.[4] In *Lamb II*, we rejected these constitutional arguments because Lamb had failed to raise them in the superior court and had asserted them for the first time on appeal.[5]

3. While the appeal in *Lamb II* was pending, Lamb sued the State of Alaska for a declaratory judgment, challenging AS 25.20.090 and AS 25.24.150 as unconstitutional on the grounds that their best-interests requirements were unduly vague and violated constitutional guarantees of equal protection, privacy, and separation of powers.[6] In June 2001 we issued *Lamb III*,

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[1] *Lamb v. Lamb*, Mem. Op. & J. No. 847 at 9 (Alaska, March 12, 1997)

[2] *Lamb v. Lamb*, Mem. Op. & J. No. 897 at 2 (Alaska, October 28, 1998) (*Lamb II*)

[3] *Id.*

[4] *Id.* at 5-6

[5] *Id.*

[6] *Lamb v. Lamb*, Mem. Op. & J. No. 1030, WL 34818205 at *2 (Alaska, June 13, 2001) (*Lamb III*)

in which we affirmed a superior court order dismissing Lamb's action against the state; we held in relevant part that Lamb's constitutional claims were barred by *res judicata* because "Lamb could have raised the constitutional validity of the custody laws in his divorce action."[7]

4. In March 2003, soon after the Alaska Child Support Enforcement Division moved to modify Lamb's child support obligation, Lamb filed a new motion in the divorce case, again seeking an order declaring AS 25.20.090 and AS 25.24.150 to be unconstitutional. After withdrawing his motion for reasons not relevant here, Lamb moved to reinstate it in August 2004. In support of his motion to reinstate his constitutional challenge, Lamb alleged changed circumstances, complaining that Pierce was preventing him from communicating with his daughter and had failed to provide the daughter's allergist with Lamb's medical history. Superior Court Judge John Suddock declined to reinstate the motion for declaratory judgment, ruling that it was barred by issue preclusion, or collateral estoppel.

5. Lamb moved for reconsideration, questioning the court's reliance on issue preclusion and asserting that he was entitled to raise the constitutional issue for purposes of requesting that the original order be modified in light of changed circumstances. Judge Suddock granted Lamb's motion for reconsideration, clarified that the original order should have relied on claim preclusion instead of issue preclusion, but also acknowledged that Lamb's claims "may in fact not be barred" given the ongoing nature of child custody cases and Lamb's "ability to plead changed circumstances." The court thus addressed the merits of the two constitutional violations

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[7] *Id.* at *3-4

that Lamb's pleadings appeared to raise at the time: denial of equal protection and privacy. In a brief written decision, the court ruled that Lamb had failed to establish that Alaska's best-interests factors would either deprive him of equal protection or violate his constitutional right to privacy.

6. Lamb again moved for reconsideration, contending that, upon granting his motion for reconsideration and deciding to rule on his constitutional claims, the superior court should have allowed both parties an opportunity to submit supplemental pleadings more fully addressing the merits of the constitutional claims. In response to Lamb's motion, Judge Suddock issued an order inviting both parties to submit additional briefing if they wished to. Pierce, who had not responded to any of Lamb's previous pleadings, did not accept the court's invitation. But Lamb filed an amended motion for declaratory judgment, which more extensively discussed original claims and raised additional theories to support his constitutional challenge. After receiving Lamb's amended motion, the superior court issued an order summarily rejecting all of Lamb's claims: Defendant's motion to declare AS 25.20.090 and AS 25.24.150 unconstitutional is denied."

7. After unsuccessfully seeking reconsideration again, Lamb filed this appeal. Lamb raises two points, arguing first that the superior court erred in failing to make specific findings in support of its ruling and, second, that the court erred in declining to declare that AS 25.24.150 and AS 25.20.090 are unconstitutional. We consider each point in turn.

8. Before addressing his constitutional claims, Lamb briefly argues that the superior court abused its discretion by failing to support its decision with adequate findings

and conclusions. Relying on AlaskaCivilRule52(a)[8] and cases interpreting that rule,[9] Lamb insists that the superior court was required to make specific findings concerning the facts it relied on and to state separately the legal conclusions it drew from those facts. By its own terms, though, Rule 52(a) applies only to "actions tried upon the facts" and has no application to decisions of any motion "except as provided in [Civil] Rule 41(b)" — a provision that applies only when a judge conducting a non-jury trial rules on a motion for a directed verdict.[10] Here, the

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[8] Alaska Rule of Civil Procedure 52(a) provides in relevant part:

> (a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions which constitute the grounds of its actions... Findings of fact and conclusions of law are necessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b)

[9] Specifically, Lamb relies on discussion from the dissenting opinions in *Virgin v. Virgin*, 990 P.2d 1040 (Alaska 1999), and *Borchgrevink v. Borchgrevink*, 941 P.2d 132 (Alaska 1997).

[10] The relevant passage of Alaska Civil Rule 41(b) provides:

> After the plaintiff, in an action tried by the court without a jury, has completed the presentation of the plaintiff's evidence, the defendant, without waiving the right to offer evidence in the event that a motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then weigh the evidence,

superior court did not reach its decision after conducting a trial on the merits; instead, it simply ruled on Lamb's motion to declare Alaska's statutory best-interests factors unconstitutional — a motion that required no trial on the facts, because it raised pure questions of law to be decided on the facts as Lamb alleged them to be. Neither Rule 52(a) nor our case law required the superior court to issue findings and conclusions in deciding this motion.

9. Lamb devotes most of his brief to challenging Alaska's best-interests statutes, AS 25.20.090 and AS 25.24.150. These provisions require courts to award custody based on the best interests of the child and list similar factors for courts to consider in determining the child's best interests. Of the two statutes, AS 25.24.150 is the most pertinent here, because it specifically governs custody judgments in divorce cases. Subsection .150(c) directs the court in such cases to consider:

(1) the physical, emotional, mental, religious, and social needs of the child;

(2) the capability and desire of each parent to meet these needs;

(3) the child's preference if the child is of sufficient age and capacity to form a preference;
(4) the love and affection existing between the child and each parent;

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evaluate the credibility of witnesses and render judgment against the plaintiff even if the plaintiff has made out a prima facie case. Alternately, the court may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a).

(5) the length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity;

(6) the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child, except that the court may not consider this willingness and ability if one parent shows that the other parent has sexually assaulted or engaged in domestic violence against the parent or a child, and that a continuing relationship with the other parent will endanger the health or safety of either the parent or the child;

(7) any evidence of domestic violence, child abuse, or child neglect in the proposed custodial household or a history of violence between the parents;

(8) evidence that substance abuse by either parent or other members of the household directly affects the emotional or physical well-being of the child;

(9) other factors that the court considers pertinent.[11]

10. Lamb challenges these factors as unconstitutional on many theories. He questions whether factors allowing a court to deny custody based on a parent's "poor cooperation," "poor communication," or ability to foster an "open and loving relationship" are unconstitutionally vague; in advancing this argument, Lamb maintains that the best-interests factors have been applied arbitrarily. Lamb also questions whether such factors violate freedom of speech by potentially penalizing a parent who expresses disapproval of a co-parent's activities. And he

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[11] A.S. 25.24.150 (c).

suggests that AS 25.24.150(c)(9) impermissibly delegates legislative authority to the judiciary by broadly allowing courts to consider any "other factors that the court considers pertinent." Lamb further maintains that the best-interests factors violated his constitutionally protected privacy and parental rights by authorizing the court to deprive him of custody without proof that his daughter might be at risk of harm. Given the importance of these rights, Lamb contends, the best- interests factors must receive strict scrutiny and should be sustained only if they further a compelling state interest.[12]

11. These arguments are unpersuasive for several reasons. As the United States Supreme Court made clear in *Troxel v. Granville*, the constitutionality of a best-interests statute like Alaska's ordinarily cannot be determined on a facial basis, that is, by determining whether the statute is invalid in all applications, but must instead be considered only as the statute applies in a particular case.[13] Here, in advancing his constitutional

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[12] Referring to our decision in Lamb III, in which we noted that the state lacked any interest in intervening in private custody disputes, *Lamb v. State*, Mem, Op. & J. No. 1030, WL 34818205 at *3 (Alaska, June 13, 2001), Lamb suggest that the best-interests statutes do not further any state interest. But this argument mistakenly overlooks the distinction between the state's understandable lack of interest in seeking to intervene as a party in private custody disputes and its unmistakable interest in adopting a statutory regime that allows courts to resolve such disputes.

[13] *Troxel v. Granville*,530 U.S. 57, 73 (2000) (invalidating the "best-interests" provision in a Washington non parental visitation statute as applied in the case at hand but refusing to consider the statute's facial validity, holding, "In this respect, we agree with Justice Kennedy that the constitutionality of any standard for awarding visitation turns on the specific manner in which that standard is applied and that the constitutional protections in this area are best 'elaborated with care.' " (quoting *Id.* at 101 (Kennedy, J., dissenting))).

challenges , Lamb focuses his briefing almost exclusively on alleged errors committed by the superior court when it awarded custody to Pierce. The main thrust of his argument, then, is that the best-interests factors were unconstitutional as they were applied in the original custody ruling. Yet as we have already pointed out above, our decision in *Lamb III* held that any claims of constitutional error arising from the original custody determination are now barred by res judicata.[14] *Lamb III* thus precludes Lamb's current claims regarding the original proceedings. Lamb may not use his right to seek a modified custody award based on changed circumstances as a basis for reviving his barred claims that the best-interests factors were unconstitutionally applied in the original custody ruling.

12. Arguably, Lamb's arguments concerning the alleged unconstitutionality of the original custody ruling might be interpreted as asserting that the same error would likely recur in any new custody decision addressing changed circumstances. But even assuming that Lamb meant to advance this contention, his theory would prove unpersuasive. Accepting for the sake of discussion Lamb's allegations of changed circumstances, we see no sound basis in the law or the record to conclude that the best-interests factors, as applied in light of these changes, would produce an unconstitutional custody ruling. Because the superior court appears to have reached the same conclusion in its order denying Lamb's motion to invalidate AS 25.20.090 and AS 25.24.150, we find no reason to disturb that court's decision.

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[14] *Lamb v. State*, Mem. Op. & J. WL 34818205 at *3 (Alaska, June 13, 2001).

13. For these reasons, we AFFIRM the superior court's order dismissing Lamb's motion for a declaratory judgment.

Appendix B

THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDCICIAL DISTRICT AT ANCHORAGE

[Filed 4-19-05]

Patricia D, Pierce,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Thomas A. Lamb,	)	
	)	
Defendant.	)	Superior Ct.3AN-95-5518 CI
_____	)	

Order

IT IS HEARBY ORDERED that the defendant's Motion for Reconsideration is DENIED.

/s/ _____
The Honorable John Suddock
Superior Court Judge

Appendix C

THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDCICIAL DISTRICT AT ANCHORAGE

[Filed 3-31-05]

Patricia D, Pierce,	)
	)
Plaintiff,	)
	)
v.	)
	)
Thomas A. Lamb,	)
	)
Defendant	) Superior Ct.3AN-95-5518 CI
_____	)

Order

IT IS HEARBY ORDERED that the defendant's motion to declare A.S. 25.20.090 and A.S. 25.24.150 unconstitutional is DENIED.

/s/ _____
The Honorable John Suddock
Superior Court Judge

Appendix D

THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDCICIAL DISTRICT AT ANCHORAGE

[Filed 1-27-05]

Patricia D, Pierce,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Thomas A. Lamb,	)	
	)	
Defendant.	)	Superior Ct.3AN-95-5518 CI
	)	

ORDER ON MOTION FOR RECONSIDERATION OF DENIAL OF DEFENDANT'S MOTION FOR REINSTATEMENT OF MOTION FOR DECLARATORY JUDGMENT AND ORDER ON MOTION FOR LATE FILING

On May 9, 1996 the court awarded sole legal custody of the parties' daughter to Plaintiff, Patricia pierce. Although this was contrary to the custody investigator's recommendation for joint legal custody, the court explained that the evidence of the parties' unwillingness and inability to communicate with each other counseled against joint legal custody. Defendant, Thomas Lamb appealed the decision. The Alaska Supreme Court affirmed the trial court's ruling. On March 5, 2003 Mr. Lamb filed a Motion

for Declaratory Judgment. He alleged that Alaska's custody statutes AS 25.20.090 and 25.24.150 that set forth the "best interests" analysis violate both the Equal Protection Clause of the U.S. Constitution and the Privacy Clause of the Alaska Constitution. Due to an initial deficient filing, he moved to reinstate the Motion in August. The court ultimately denied the Motion on December 20, 2004. explaining that Defendant's failure to litigate the issue during the custody case nine years prior barred him from doing so now. The court characterized this bar as collateral estoppel or issue preclusion. Mr. Lamb filed a Motion for Reconsideration of the court's denial of the Motion for Reinstatement of the Motion for Declaratory Judgment and a Motion for Late Filing. The court grants the Motion for Late Filing and the Motion for Reconsideration.

The court was mistaken when it characterized the matter as issue preclusion. What it intended to explain was the Mr. lamb was barred from relitigating his custody claim by the doctrine of claim preclusion. Claim preclusion or *res judicata* prevents a party not only from raising a claim that has already been reduced to a final judgment, but also from litigating those claims which could have been asserted in the original cause of action. *Dixon v. Pouncy*, 979 P.2d 520, 523 (Alaska 1999)

The general rule, is that "[a] party should not be allowed to relitigate the same facts in the hope of gaining a more favorable result. There must be a material change in circumstances before a support order can be modified." *Bunn v. House*, 934 P.2d 753, 757-58 (Alaska 1997). Changes in the law, in addition to changed factual circumstances satisfy this requirement, *Id.* at 758. Mr. Lamb's constitutional challenges to the "best interest" statutes do not arise from any changes in the law. These statutes were in effect at the time of the initial order although he failed to challenge them at that time.

Because of the ongoing retained jurisdiction in child custody cases, and Mr. Lamb's recurrent ability to plead

changed circumstances, thought, his current Motion for Declaratory Judgment may in fact not be barred. The court elects to address his assertion that the state's "best interests" analysis violates the U.S. Constitution's equal Protection Clause of the Fourteenth Amendment and the Privacy Clause of Alaska's Constitution.

Mr. Lamb asserts that courts apply the "best interests" analysis to similarly situated parties but reach varying results in their custody awards. This, he claims, is a violation of the federal Equal Protection Clause. He cites Hamilton v. Hamilton, 42 P.3d 1107, 1112 (Alaska 2002) as a case in which the trail court awarded joint legal custody to the parties even thought communication had deteriorated during the separation. To suggest that parties in all custody cases are similarly situated merely because there exists a problem with communication is to oversimplify the issue. In both legal and physical custody disputes, courts are charged with the heavy burden of assessing all factors relevant to determining the best interest of a child. the trial court in the instant case found, and the supreme Court affirmed, that the parties were unable to communicate with each other. This communication problem warranted a finding that only one parent should be awarded legal custody and with it the right to make important decisions regarding the health, education and welfare of the child.

It is possible that another judge trying this case would arrive at a different conclusion regarding legal custody than the trial judge did. This does not, however, constitute an equal protection violation. Both decisions might fall within the broad range of acceptable judicial discretion. The "best interests" analysis simply gives a court a framework with which to make its necessarily subjective decision. It does not, however, mandate uniformity, even when similar circumstances exist in various cases. That the custody factors can lead to disparate outcomes does not demonstrate they are arbitrary or irrational.

Mr. Lamb's second argument is that the award of sole legal custody to Ms. Pierce violates his right to privacy under the Alaska Constitution. He argues that the State's interest in custody matters is "limited" and as such, the State may not deprive him of legal custody without infringing on his constitutional rights. The Alaska Supreme Court has held that the State must have a compelling reason to restrict a person's right to privacy. *State v. Planned Parenthood of Alaska*, 53 p.3d 30,41 (Alaska 2001). Mr. Lamb implicitly contends that any restriction on custody or visitation in a domestic case implicates the right to privacy and triggers strict scrutiny. Even if that were true, the state's interests in the welfare its children is compelling. Indeed, the court can think of few more compelling interests that that of ensuring the welfare of children in a custody dispute. The "best interests" analysis employed by the court emphasizes the child's rights and welfare, over the desires of any one parent. This approach does not infringe on a parent's right to privacy under Alaska's Constitution.

Mr. Lamb's Motion for Declaratory Judgment invalidating A.S. 25.20.090 and A.S. 25.24.150 is denied.

Dated this 27th day of January, 2005 at Anchorage, Alaska

/s/ _____
The Honorable John Suddock
Superior Court Judge

Appendix E

THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDCICIAL DISTRICT AT ANCHORAGE

[Filed 3-25-03]

PATRICIA D, LAMB,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
THOMAS A. LAMB,	)	
	)	
Defendant.	)	Case. No. 3AN-95-5518 CI
	)	

[Filed 03-25-03]

STATE'S RESPONSE DEFENDANT'S MOTION FOR DECLARATORY JUDGEMENT

In January 2003, the Alaska Child Support Enforcement Division ("CSED") filed a motion to modify the parties' support order. The motion is currently pending before this court. In the meantime, on March 10, 2003, defendant Thomas Lamb filed a motion for declaratory judgment. In his motion, Mr. Lamb asks the court to declare unconstitutional the state's custody laws, AS 25.20.090 and AS 25.24.150. As CSED pointed out in an earlier pleading, it can take no position on the custody and visitation issues. By statute, CSED may not be involved in

such issues. *See* AS 25.27.080 (c). For this reason, CSED does not intend to respond to Mr. Lamb's motion for declaratory judgment. The State of Alaska (more generally) reserves the right to intervene on the constitutional issues at a later time. *See* Alaska R. App. P. 514 (f).

GREGG D. RENKES
ATTORNEY GENERAL

By: /s/_____

Diane L. Wendlandt
Assistant Attorney General
Bar No. 9011121

Appendix F

9

1. There Was No Actual Controversy Between Mr. Lamb And The State Because The State Has No Interest In The Custody Of Mr. Lamb's Child.

Mr. Lamb is upset about the divorce court's application of Alaska's custody law. With respect to custody issues, there is no actual controversy between Mr. Lamb and the State of Alaska. The State was not a party to Mr. Lamb's divorce, and it takes no position concerning who should have custody of Mr. Lamb's child. This is a private matter between Mr. Lamb and his ex-wife.

Nevertheless, Mr. Lamb sued the State, seeking a declaration that Alaska's custody law was unconstitutional. The authority of the Alaska courts to grant declaratory relief is found in Alaska Stat. 22.10.020 (g) (2000), which states:

> In case of an actual controversy in the state, the superior court, upon the filing of an appropriate pleading, may declare the rights and legal relations of an interested party seeking the declaration, whether or not further relief is or could be sought.

See Alaska Stat. 22.10.020 (g) (2000). The Alaska Supreme Court has described the "case in controversy" requirement as follows:

The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. *** It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon hypothetical state of facts.

Appendix G

THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDCICIAL DISTRICT AT ANCHORAGE

[Filed 5-09-96]

PATRICIA D, LAMB,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
THOMAS A. LAMB,	)	
	)	
Defendant.	)	Case. No. 3AN-95-5518 CI
	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case came on for trial on April 23-24, 1996, with both parties personally present and with their counsel of record. This court having considered all the evidence presented and the arguments of counsel, now makes the following:

1. At the time of filing the complaint for divorce on July 3, 1995, both parties were residents of the State of Alaska and Alaska was the home state for the minor child.

2. Patricia D. Lamb and Thomas A. Lamb were married in Anchorage, Alaska, on March 21, 1997, and have since that date been husband and wife.

3. The parties separated from each other on or about February, 1995.

4. There exists an incompatibility of temperament and irreconcilable differences between the parties making it impossible for them to continue to live together as husband and wife.

5. One minor child has been born the issue of this marriage, namely: Tommie Alexandria lamb born on August 10, 1993 at Anchorage, Alaska.

(...)

19. Neither parent, members of their household, family members or friends, shall be permitted to make any disparaging remarks about the other parent to the child or in her presence.

CONCLUSIONS OF LAW

1. This court has personal jurisdiction over the parties and their minor child, subject matter jurisdiction and venue is proper I the Third Judicial District at Anchorage, Alaska.

2. The incompatibility of temperament and the irreconcilable differences existing between the parties support the entry of a final divorce decree forever dissolving the bonds of matrimony heretofore existing between the parties.

3. The fair and equitable division of the marital estate and the division of the marital debt is as specified in the findings of fact stated above.

4. The welfare and the best interests of the minor child are served by the award of shared custody to the parents as stated above in the findings of fact.

5. Because the parties are not able and/or willing to communicate with each other in addressing the welfare and best interests of the minor child the award of

joint legal custody is not appropriate in this case. Sole legal custody shall be awarded to the mother.

6. A Qualified Domestic Relations order shall be entered equally dividing the marital fraction of the retirement benefits earned by Patricia A. Lamb during the marriage.

IT IS HEARBY ORDERED, ADJUGED, AND DECREED that a final decree and judgment shall be entered consistent with the above stated findings of fact and conclusions of law. Plaintiff's counsel shall prepare and submit to the court an appropriate QDRO order that meets the requirements of the Air National Guard for division of the marital fraction of the retirement benefits earned by Patricia D. lamb during the marriage.

IT IS FURTHER ORDERED,ADJUGED AND DECREED that each side bear their own attorney's fees and costs.

Dated this 9th day of May, 1996 at Anchorage, Alaska.

/s/ _____
RENE J. GONZALEZ
Superior Court Judge

Appendix H

Alaska Statute 25.20.090 and Alaska Statute 25.24.150

AS 25.20.090. Factors For Consideration in Awarding Shared Child Custody.

In determining whether to award shared custody of a child the court shall consider

(1) the child's preference if the child is of sufficient age and capacity to form a preference;
(2) the needs of the child;

(3) the stability of the home environment likely to be offered by each parent;

(4) the education of the child;

(5) the advantages of keeping the child in the community where the child presently resides;

(6) the optimal time for the child to spend with each parent considering

(A) the actual time spent with each parent;

(B) the proximity of each parent to the other and to the school in which the child is enrolled;

(C) the feasibility of travel between the parents;

(D) special needs unique to the child that may be better met by one parent than the other;

(E) the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child, except that the court may not consider this willingness and ability if one parent shows that the other parent has sexually assaulted or engaged in domestic violence against the parent or a child, and that a continuing relationship with the other parent will endanger the health or safety of either the parent or the child;

(7) any findings and recommendations of a neutral mediator;

(8) any evidence of domestic violence, child abuse, or child neglect in the proposed custodial household or a history of violence between the parents;

(9) evidence that substance abuse by either parent or other members of the household directly affects the emotional or physical well-being of the child;

(10) other factors the court considers pertinent.

AS 25.24.150. Judgments For Custody.

(a) In an action for divorce or for legal separation or for placement of a child when one or both parents have died, the court may, if it has jurisdiction under AS 25.30.300 - 25.30.320, and is an appropriate forum under AS 25.30.350 and 25.30.360, during the pendency of the action, or at the final hearing or at any time thereafter during the minority of a child of the marriage, make, modify, or vacate an order for the custody of or visitation with the minor child that may seem necessary or proper, including an order that

provides for visitation by a grandparent or other person if that is in the best interests of the child.

(b) If a guardian ad litem for a child is appointed, the appointment shall be made under the terms of AS 25.24.310 (c).

(c) The court shall determine custody in accordance with the best interests of the child under AS 25.20.060 - 25.20.130. In determining the best interests of the child the court shall consider

(1) the physical, emotional, mental, religious, and social needs of the child;

(2) the capability and desire of each parent to meet these needs;

(3) the child's preference if the child is of sufficient age and capacity to form a preference;

(4) the love and affection existing between the child and each parent;

(5) the length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity;

(6) the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child, except that the court may not consider this willingness and ability if one parent shows that the other parent has sexually assaulted or engaged in domestic violence against the parent or a child, and that a continuing relationship with the other parent will endanger the health or safety of either the parent or the child;

(7) any evidence of domestic violence, child abuse, or child neglect in the proposed custodial household or a history of violence between the parents;

(8) evidence that substance abuse by either parent or other members of the household directly affects the emotional or physical well-being of the child;

(9) other factors that the court considers pertinent.

(d) In awarding custody the court may consider only those facts that directly affect the well-being of the child.

(e) Notwithstanding the provisions of (d) of this section, in awarding custody the court shall comply with the provisions of 25 U.S.C. 1901 - 1963 (P.L. 95-608, the Indian Child Welfare Act of 1978).

(f) If the issue of child custody is before the court at the time it issues a judgment under AS 25.24.160 , the court shall concurrently issue a judgment for custody under this section unless, subject to AS 25.24.155, the court delays the custody decision for a later time.

(g) There is a rebuttable presumption that a parent who has a history of perpetrating domestic violence against the other parent, a child, or a domestic living partner may not be awarded sole legal custody, sole physical custody, joint legal custody, or joint physical custody of a child.

(h) A parent has a history of perpetrating domestic violence under (g) of this section if the court finds that, during one incident of domestic violence, the parent caused serious physical injury or the court finds that the parent has engaged in more than one incident of domestic violence. The presumption may be overcome by a preponderance of the evidence that the perpetrating parent has successfully

completed an intervention program for batterers, where reasonably available, that the parent does not engage in substance abuse, and that the best interests of the child require that parent's participation as a custodial parent because the other parent is absent, suffers from a diagnosed mental illness that affects parenting abilities, or engages in substance abuse that affects parenting abilities, or because of other circumstances that affect the best interests of the child.

(i) If the court finds that both parents have a history of perpetrating domestic violence under (g) of this section, the court shall either

(1) award sole legal and physical custody to the parent who is less likely to continue to perpetrate the violence and require that the custodial parent complete a treatment program; or

(2) if necessary to protect the welfare of the child, award sole legal or physical custody, or both, to a suitable third person if the person would not allow access to a violent parent except as ordered by the court.

(j) If the court finds that a parent has a history of perpetrating domestic violence under (g) of this section, the court shall allow only supervised visitation by that parent with the child, conditioned on that parent's participating in and successfully completing an intervention program for batterers, and a parenting education program, where reasonably available, except that the court may allow unsupervised visitation if it is shown by a preponderance of the evidence that the violent parent has completed a substance abuse treatment program if the court considers it appropriate, is not abusing alcohol or psychoactive drugs, does not pose a danger of mental or physical harm to the

child, and unsupervised visitation is in the child's best interests.

(k) The fact that an abused parent suffers from the effects of the abuse does not constitute a basis for denying custody to the abused parent unless the court finds that the effects of the domestic violence are so severe that they render the parent unable to safely parent the child.

Appendix I

United States Constitution

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.